Office Supreme Court, U.S.
FILED
NOV 4
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners*,

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia,

Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Opinion Below	3
Jurisdiction	3
Basis for Federal Jurisdiction in the United States District Court	3
Question Presented	3
Statutes Involved	4
Statement of the Case	4
A. The District Court Proceedings, Opinion and Judgment	4
B. The Fourth Circuit's Majority Opinion and the Dissent of Chief Judge Sobeloff	8
Reasons for Granting the Writ	12
Conclusion	21
Appendix A:	
The Majority Opinion	1a
The Dissenting Opinion	6a
Judgment	13a
Appendix B:	
Labor Management Relation Act, 1947:	
Section 8(d) [29 USCA 158(d)]	14a
Section 302 (29 USCA 186)	14a
Federal Rules of Civil Procedure, Rule 56	15a

Table of Cases

Cox v. Gatliff Coal Co., DC, E.D. Ky., 1945, 59 F. Supp. 882	12, 14
Eliason v. Wilborn, 281 U.S. 457	20
Farmers Nat. Bank & Trust Co. v. Flexible Truck Corp., 3 Cir., 81 F. 2d 541	20

Page

Gatliff Coal Co. v. Cox, 6 Cir., 152 F. 2d 52 ....12, 14, 16
H. J. Heinz Co. v. NLRB, 311 U.S. 514, 523-4, 525 ..12, 14, 15
Lewis v. Benedict Coal Corp., 361 U.S. 459 ....11, 12, 15, 16, 18, 19, 20
Lewis v. Mearns, DC, N.D. W. Va., 1958, 168 F. Supp. 134 16
Lewis v. Mears, DC, W.D. Pa., 1960, 189 F. Supp. 503, aff'd 3 Cir., —— F. 2d ——, 48 LRRM 3120 10
Lewis v. Lowry, DC, W.D. Va., 1960, 190 F. Supp. 490 7, 8, 11
Lewis v. Lowry, 4 Cir., —— F. 2d ——, 48 LRRM 3062 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21
Mearns v. Lewis, 4 Cir., 268 F. 2d 427 .....10, 12, 16, 17
NLRB v. Industrial Cotton Mills, 4 Cir., 208 F. 2d 87, 91 20
Textile Workers Union v. Lincoln Mills, 353 U.S. 448 .. 15
United States v. Carter, 353 U.S. 210, 220 20
United States v. General Motors Corp., 323 U.S. 373, 374, 377 12
United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579 15

STATUTES

Labor Management Relations Act, 1947 7
Section 8(d) [29 USCA 158(d)] 3, 4, 10, 12, 13, 15
Section 302(e) [29 USCA 186(e)] 3, 4, 9, 10, 13, 17
Section 302(e)(5) [29 USCA 186(e)(5)] 4, 12, 13
Section 302(e)(5)(B) [29 USCA 186(e)(5)(B)] .. 17

Federal Rules of Civil Procedure, Rule 56 ..... 4, 8

MISCELLANEOUS

Wigmore on Evidence, 3d Ed., Vol. IX, p. 16 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners,*

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, John L. Lewis, Henry G. Schmidt, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950,[1] pray that a writ of certiorari issue to review

[1] Herein called "Fund". "Petitioners" are also called "Trustees" herein.

the judgment of the United States Court of Appeals for the Fourth Circuit[2] entered September 16, 1961, in Case No. 8298, styled John L. Lewis, Henry G. Schmidt, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, Appellees, v. F. Arnold Lowry, Individually, and Trading as Lowry Coal Company, Appellant,[3] wherein the Fourth Circuit, Chief Judge Sobeloff dissenting, reversed with costs the judgment entered by the United States District Court for the Western District of Virginia, at Abingdon,[4] in Petitioners' favor and against Lowry for $49,531.40 (and interest and costs) and remanded the cause "for further proceedings consistent with the opinion of the" Fourth Circuit (R. 21; A. 13a).[5]

A certified Appendix record in said case, together with the proceedings in the Fourth Circuit, is furnished herewith, in accordance with the Rules of this Court.

---

[2] The United States Court of Appeals for the Fourth Circuit is herein called either the "Fourth Circuit" or "Court of Appeals".

[3] Herein called "Lowry".

[4] Herein the United States District Court for the Western District of Virginia, at Abingdon, is called either "district court" or "trial court".

[5] The abbreviation "R." refers to the printed certified record filed in this Court under its Rule 21; the abbreviation "A." refers to the Appendix to the instant Petition; the abbreviation "D.A." refers to the Appendix to Lowry's brief in the Fourth Circuit and designated as 1a in the certified record; and the abbreviation "P.A." refers to the Appendix to Trustees' brief in the Fourth Circuit and designated as 2a in the certified record.

OPINION BELOW

The district court's opinion appears in the certified Appendix record (D.A. 33-8) and is reported in 190 F. Supp. 490. The Fourth Circuit's opinion appears in Appendix A hereto at page 1a, et seq.; and the dissenting opinion of Chief Justice Sobeloff appears in Appendix A hereto at page 6a et seq. Both appear in the certified Appendix record (R. 5-19) and are reported in F. 2d , and in 48 LRRM 3062.

JURISDICTION

The Fourth Circuit's judgment reversing the trial court's judgment and remanding the case for further proceedings, as aforesaid, was entered September 16, 1961 (A. 13a).

This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(e).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for federal jurisdiction in the United States District Court of the complaint was diversity of citizenship between the plaintiffs and the defendant and the amount involved.

QUESTION PRESENTED

In an action by Trustees of an irrevocable trust contained in an industry-wide collective bargaining contract between bituminous coal operators and United Mine Workers of America, in writing in conformity with Section 8(d) of the Labor Management Relations Act, 1947, and which trust was created pursuant to that Act's Section 302(c) for the benefit of all em-

ployees of all employer signatories to the agreement, brought to recover unpaid moneys due the trust under said trust provisions against a single operator signatory, (a) does national labor policy as set forth in said statutes preclude proof by a signatory that there was an oral secret agreement between himself and a union representative that such written collective bargaining agreement was a "sham" or pretensive one and that the real agreement was the signatory need pay, not according to the tenor of the written instrument's obligations, but only what he could; and (b) does such national labor policy foreclose such a defense as against the Trustees so as to require the signatory to pay in accordance with his written agreement, even though such oral secret agreement may be shown?

STATUTES INVOLVED

The pertinent statutory provisions involved are Sections 8(d) and 302(c)(5) of the Labor Management Relations Act, 1947 (called "Act") [29 USCA 158(d) and 186(c)(5)], and 28 USCA, Rule 56, Federal Rules of Civil Procedure, which are set forth in Appendix B hereto (page 14a, et seq.).

STATEMENT OF THE CASE

A. The District Court Proceedings, Opinion and Judgment

Pursuant to the Act's Section 302(c), the National Bituminous Coal Wage Agreement of 1950 created the "United Mine Workers of America Welfare and Retirement Fund of 1950" as an irrevocable trust for employees of signatory coal operators, their families and dependents (P.A. 12). By its terms "each operator signatory" covenanted to pay into the Fund thirty cents "on each ton of coal produced for use or

for sale" (P.A. 12), which was increased to forty cents by an amendment effective October 1, 1952.[6]

Lowry, operating mines in Harlan County, Kentucky, became a signatory to this industry-wide Agreement with United Mine Workers of America (called "UMW") and executed the 1952, 1955 and 1956 Agreements (P.A. 2-4). Thereunder, from May 1, 1955 to August 31, 1958, he produced 131,998.5 tons of coal for use or for sale (P.A. 4). As the three Agreements required (P.A. 14), Lowry remitted employee union dues and assessments to UMW, asserting he himself paid such dues but admitting that the assessments were deducted from employees' wages (D.A. 23-5). Lowry's employees applied to the Fund, and the Fund approved their applications, for hospital and medical benefits (P.A. 27-8) and such benefits were actually provided by the Fund to most of Lowry's employees "as a result of their eligibility" as Lowry employees (P.A. 28-9). On one occasion, when Fund requested Lowry furnish information concerning an employee's eligibility, Lowry supplied the information requisite to the employee's receiving Fund benefits (P.A. 30-1).

Though admittedly producing 131,998.5 tons, Lowry paid royalty payments required by the agreements upon only 4,610 tons. Such payments were included in twenty-five monthly payments which Lowry transmitted to the Fund, each accompanied by a Check

---

[6] The National Bituminous Coal Wage Agreement of 1950 is called "1950 Agreement" (P.A. 11); as amended effective October 1, 1952, it is called the "1952 Agreement" (P.A. 7); as amended effective September 1, 1955, it is called "1955 Agreement" (P.A. 8); and as amended effective October 1, 1956, it is called "1956 Agreement" (P.A. 10).

Letter of Advice[7] in which Lowry certified, *but understated*, his tonnage. When the Fund advised Lowry that his reported tonnage in 1955 and 1956 was grossly under what he had reported to others as his true tonnage and requested payment for tonnage not reported (P.A. 17), Lowry claimed the Fund was misinformed and that his payments were current (P.A. 22). Fund's request that Lowry's records be examined by an independent certified public or Fund accountants brought Lowry's proffer of settlement of the controversy for $5,000.00 (P.A. 23)—an offer rejected by Fund—but, significantly, Lowry did not disclaim the agreements.

Upon Lowry's failure to perform his obligation pursuant to the Agreements, Petitioners instituted action to recover a money judgment against him for the unpaid royalties. Lowry sought to avoid liability on the ground that the agreements were executed "as a sham" and that there was agreement with a UMW representative that the agreements "would never become effective" (D.A. 30).[8]

Petitioners moved for summary judgment (P.A. 6) under Rule 56, Federal Rules of Civil Procedure,

---

[7] There were 25 Check Letters of Advice received from Lowry. All are in the original record on file in the Fourth Circuit. For brevity purposes and to comply with that Court's rulings, counsel printed one of such letters (P.A. 25).

[8] Lowry also asserted the defense of duress based upon his affidavit statement that a long history of violence against non-union operators by UMW "carries with it the implied threat" of resultant injury to coal operators, their property and employees who attempt to work contrary to UMW's wishes (D.A. 31). This defense was rejected by the district court (D.A. 36) and the dissent agreed (A. 12a). The majority did not reverse the district court on this issue.

asserting "the pleadings, interrogatories and depositions filed . . . and the affidavits and exhibits attached" to the motion "show there is no genuine issue as to any material fact" and that Petitioners "are entitled to judgment as a matter of law". Lowry, in turn, filed an affidavit (D.A. 29-32) which, though containing *all facts* upon which he relies to support his legal defenses allegedly voiding the executed agreements, did not contradict any factual recitals in Petitioners' affidavits and exhibits.

According to Lowry, he signed the 1952 Agreement when a UMW representative, in the presence of three employees, presented the contract to him for signature but only after his telling the union representative he "couldn't pay and operate under the contract" and the representative telling him that signing the agreement "would get them off his neck" and for Lowry "to pay whatever I could" (D.A. 17-8). Lowry admits he was aware of the contract's terms and that there were no threats made to him or his employees and no picket line was established at Lowry's operation (D.A. 19).

On the occasions when the same union representative presented the 1955 Agreement and the 1956 Agreement to him, Lowry related there were no threats and no conversation but "Just a meeting or a matter of obtaining a contract and signing it" (D.A. 20-2, 23, 31).

The district court's opinion (D.A. 33-7) rejected Lowry's "sham" contract defense, declaring "Such a defense would do violence to the requirement of the National Labor Relations Act giving either party the right to request a written agreement embracing the entire agreement of the parties" and "Moreover, such a defense would open the door to varying solemn writ-

ten contracts by prior oral agreements and would do much toward tearing down our basic acceptance of the strength and importance to be given to written agreements" (D.A. 36).[9]

The district court, being of opinion, "that there is no material fact upon which reasonable minds could differ or from which varying inferences could be drawn", and under the compelling language of Rule 56(c), Federal Rules, it granted Petitioners' summary judgment motion (D.A. 37) and by judgment order of November 7, 1960, ordered that Petitioners recover of Lowry $49,531.40 plus interest and costs (D.A. 32-3). Lowry appealed.

B. The Fourth Circuit's Majority Opinion and the Dissent of Chief Judge Sobeloff

While the Fourth Circuit's majority did not challenge the district court's finding that "there is no material fact upon which reasonable minds could differ or from which varying inferences could be drawn", it nevertheless reversed the district court's judgment and remanded the case for further proceedings consistent with the majority's opinion, declaring "We think the summary judgment inappropriate in the light of the factual issues tendered" (A. 1a). And, though Lowry did not contend in either of the lower courts he had other facts to present, the majority declared "the factual situation should be more fully developed" and "On the present record we think the facts are not sufficiently established to determine whether the situation is governed by the rule which

[9] In the trial court Petitioners asserted that the doctrine of ratification required judgment against Lowry. The district court agreed (D.A. 36-7).

denies enforcement of pretensive agreements or by the rule which forecloses the use of parol evidence to establish a contemporaneous oral agreement to vary the terms of a valid contract" (A. 3a, 4a).

Dissenting, Chief Judge Sobeloff regarded the district court's action "sound" and the remand merely to establish a "legal irrelevancy" (A. 6a). The crucial difference between the two opinions lies in the majority's refusal to adopt Trustees' contention that national labor policy forecloses the right of an operator signatory to an industry-wide labor agreement, containing an irrevocable trust for benefit of employees, from varying its terms and evading his obligations to the trust on the ground that the written agreement was a "sham" or pretensive agreement.

The dissent challenges the majority opinion on three grounds.[10]

First, the majority shows no concern for Section 302(c) or its purpose and is satisfied to regard the instant case as one unrelated thereto or to its impact upon employees in an industry-wide situation. The dissent rejects the majority's analogy of this case to the majority's supposititious "April Fool's Day" agreement (A. 5a) and, noting this case presents no such joke, emphasizes "this is not just a small case involving a few coal miners" and "If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry

[10] While the dissent points to the factual recitals upon which Trustees based their claim of ratification (A. 6a-7a), which the district court sustained (D.A. 36-7), Chief Judge Sobeloff bases his dissent "upon broader grounds" (A. 7a), which reflect national labor policy.

wide" and, significantly, it points to ten other cases[11] where signatories have attempted to "renege on their agreed-upon obligations" with respect to the Fund, noting one in which an operator was successful (A. 7a).[12]

The dissent is unwilling to treat the instant irrevocable trust in an industry-wide labor contract, created pursuant to Section 302(c) which, safeguarding employees, requires welfare benefits be detailed in writing as one unrelated to that statute. The dissent gives concern, too, to Congress' purpose in protecting such employees concerning their rights to welfare benefits and in assuring them of the availability of trust funds in periods of their unemployment, illness, old age and death, which may be achieved, the dissent urges, only by requiring the obligation to pay royalties be in writing. If publicly declared written agreements may be "sapped by a secret compact", then, poses the dissent, such protection and assurances are rendered abortive (A. 8a-9a). Further, in an industry-wide agreement, all operators signatories have a right to know if some are paying less royalties than others. (A. 9a).

Secondly, the dissent proclaims that as a matter of substantive labor law, courts should not permit the "sham" exception; that regard must be had for the spirit of the Act's Section 8(d) mandate that a labor

---

[11] Such cases are listed and cited in the dissenting opinion (A. 7a, fn. 1). Significantly one of the one cases is the Fourth Circuit's *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, discussed (*post*, p. 16) as being in direct conflict with the instant case.

[12] The case noted is Lewis v. Mears, DC, W.D., Pa., 1960, 189 F. Supp. 503, aff'd. 3 Cir., ... F. 2d ....., October 11, 1961, rehearing filed November 13, 1961, 48 LRRM 3120.

contract be in writing if requested by either party; that a bargaining agreement is a code for the industry to which it applies and the union bargains, not for itself alone, but as employees' representatives and, in this case, for Trustees; that employees and the public alike have a right to know the terms of the "real" agreement; and if written agreements may be nullified by secret oral agreement, "the purpose of the contract as an instrument of industrial peace may be frustrated" (A. 10a-11a). The majority finds "no such broad and collateral effect" thereof and that the statutory requirement of written agreements is directed toward protecting the "real agreement" and "not to alteration of accepted principles governing proof of the real agreement" (A. 5a).

Thirdly, the majority thesis that Trustees' rights are derivative ones "as third party beneficiaries of the real agreement" is rejected by the dissent (A. 5a), which argues that even if the sub-rosa understanding could be asserted against the union, to allow the defense against the instant trust, sponsored jointly by labor and industry and approved by Congress, would undermine the statutory scheme for creating irrevocable trusts for employees; that the Fund is not union property (Lewis v. Benedict Coal Corp., 361 U.S. 459, 465); and it would be at war with the statutory policy to permit a trust fund to be eroded by clandestine arrangements between an employer and union, asking "what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?" (A. 11a-12a)[12a]

[12a] The district court rejected Lowry's duress defense (*ante*, p. 6, fn. 8). The dissent regarded it as "frivolous", declaring there is no necessity to take testimony thereon (A. 12a).

REASONS FOR GRANTING THE WRIT

I.

The Fourth Circuit has decided a federal question, important in the processing of collective bargaining agreements and in the Act's administration as it concerns both industry-wide bargaining agreements and irrevocable industrial trusts for employees in a manner which frustrates rather than promotes industrial stabilization through collective bargaining agreements and in conflict with the purposes, spirit and language of Congress in enacting the Act's Section 8(d) and Section 302(c)(5), and at variance with the national labor policy expressed by this Court in *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514, and in *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, and by the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F. 2d 52 affirming *Cox* v. *Gatliff Coal Co.*, DC, E.D. Ky., 1945, 59 F. Supp. 882; and it is in direct conflict with the Fourth Circuit's *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, which results in the question being in a confused and uncertain state not only as between the Fourth and Sixth Circuits but even in the Fourth Circuit itself.

II.

Though the case is remanded for further proceedings, there is an important issue of law which is fundamental to the further conduct thereof and, as noted, on which there is a conflict. Under these circumstances, this Court has held that certiorari is available, even though the judgment to be reviewed is non-final. *United States* v. *General Motors Corp.*, 323 U.S. 373, 374, 377.

III.

Clearly, the question presented is of importance in the administration of the Act as it relates both to

the processing of bargaining agreements and industrial trust funds since the irrevocable trust for which Trustees seek to recover the royalties is one created pursuant to the Act's Section 302(c) and is contained in an industry-wide collective bargaining agreement. The dissent's admonition is meaningful when it observes that "*this is not just a small case involving a few coal miners*" and "*If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry wide* (A. 7a). As the dissent indicates (A. 7a), Lowry's efforts to erode the Fund do not stand alone, for in at least ten other instances have operators signatory to the Agreement sought "to renege on their agreed-upon obligations".[13]

Indeed, the impact will be even more expansive than the dissent suggests, for Lowry's pattern of avoiding his written obligation, upon which the Fourth Circuit's majority has placed its imprimatur, may well become the device and weapon for use by employers in all other industries to destroy employee confidence in the processes of collective bargaining and thereby to frustrate congressionally-expressed national policy of eradicating industrial strife through the medium of written collective bargaining agreements. Clearly, the rule of law which the Fourth Circuit endorses in this case, which renders instable and uncertain bargaining contracts, is antithetical to the spirit, the purpose, and the language of the Act's Sections 8(d) and 302(c)(5). As the Fourth Circuit's majority opinion affects the instant case, the dissent poses it succinctly and aptly by its query: "what kind of trust is it that leaves the door open to impairment by secret agreements, even those participated in by a donor?" (R. 18; A. 11a).

---

[13] These cases are listed in the dissent (A. 7a). Unless otherwise indicated, all emphasis herein are supplied.

IV.

The three reasons assigned by Chief Judge Sobeloff for his differences with the Fourth Circuit's majority are consonant with the Act's spirit, purpose and language and with the decisional law already noted. The majority opinion collides therewith and is erroneous.

The original National Labor Relations Act (the "Wagner Act") was relatively new when this Court noted its preference for written collective bargaining agreements as "Contrasted with the unilateral statement by the employer of his labor policy" and mandated that agreements reached by bargaining negotiators be reduced to writing "as a permanent memorial" and "an authentic record" of its terms, not only to evidence the employer's good faith but as "the final step in the bargaining process" and because, significantly, "the signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife". *H. J. Heinz Co.* v. *NLRB,* 311 U.S. 514, 523-4, 525.

Pointing to *Heinz*, the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 6 Cir., 152 F.2d 52, 56, sanctioned a district court's declarations that national labor policy demanded that collective bargaining agreements be accorded "a more secure and stable position in our National economy than that of ordinary common law contracts which may be altered at pleasure" and that the "National Labor Relations Act clearly precludes defendant's reliance upon the prior or contemporaneous oral agreement upon which its defense . . . is based." *Cox* v. *Gatliff Coal Co.*, DC, E.D. Ky., 1945, 59 F. Supp. 882, 886.

Statutory accord with national labor policy as expressed in *Heinz* is found in Congress' enactment of Section 8(d) [29 USCA 158(d)], which requires, as an element of good faith bargaining, "the execution of a written contract incorporating any agreement reached if requested by either party." (A. 14a). On at least three occasions since Congress adopted Section 8(d), this Court has recognized the pertinency of national labor policy in interpreting and implementing collective bargaining agreements. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448; *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459; *and United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578.

Indeed, the Fourth Circuit's declarations that it finds "no such broad and collateral effect of the statutory provision" and that the statutory requirement "is directed to the real agreement of the parties" but "does not make sacrosanct a pretensive agreement inconsistent with the real agreement reached in the collective bargaining process" (A. 4a) are at odds not only with the teaching of *Lincoln Mills, Benedict* and *Warrior* that the interpretation and implementation of bargaining agreements must be accommodative to national labor policy but also with this Court's enunciation in *Warrior* that the collective agreement "calls into being a new common law—the common law of a particular industry" (363 U.S. 579) which, in the instant case, is the bituminous coal industry.

It is plain from the majority's result it was unwilling to regard the instant bargaining agreement as a "generalized code" for the bituminous coal industry. Such unwillingness is consistent with the majority's disregard for the dissent's reminder, harmonious with *Lewis*

v. *Benedict Coal Corp.*, 361 U.S. 459, 468, that the union, in addition to bargaining for itself, bargained also for employees and the Trustees, and that these interests, as well as the public, are entitled to know from a written agreement what are the contract's real terms. The same unwillingness to accord to collective bargaining agreements the protection of federal labor policy explains the majority's indifference to the dissent's further argument that "If such written contracts can be nullified whenever the employer and the union come to some other secret oral agreement, the purpose of the contract as an instrument of industrial peace may be frustrated" (A. 11a).

The majority opinion's discordance with national labor policy stands in sharp contrast to its concern therefor in 1958 when, in *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427, it affirmed a district court holding which rejected a coal operator's contention that he signed the same industry-wide agreement herein involved merely as a "formality" and that a union representative had told him he need pay only such royalties as he could. *Lewis* v. *Mearns*, DC, N.D. W. Va., 1958, 168 F. Supp. 134. The dissent's insistence in the case at bar that remand establishes only a "legal irrelevancy" accords with the district court's appraisal in *Mearns* that the oral testimony "At most" shows "only a prior or contemporaneous oral agreement which he is barred from introducing here to vary the terms of the written contract by the parol evidence rule" (168 F. Supp. 138), and continuing,

> "In addition, the written agreement here was the final step in a collective bargaining process, under Section 8(d) of the . . . Act. . . . It has been held that parties to such contracts are precluded by the

> Taft-Hartley Act from relying upon prior or contemporaneous oral agreements. Gatliff Coal Co. v. Cox, 6 Cir., 152 F. 2d 52."

The Fourth Circuit, in a per curiam opinion in *Mearns*, adopted the "District Court's opinion which fully discusses the facts and the law" (268 F. 2d 428).

When *Mearns* is compared with the majority's *Lowry* (the instant case), it is clear that Fourth Circuit cases are at odds with each other; yet both Chief Judge Sobeloff and Judge Haynsworth, who wrote the majority opinion in *Lowry*, participated in *Mearns* and both agreed, as the district court opinion stated, the Act and parol evidence rule alike bar admission of a pretensive agreement to vary the terms of this industry-wide bargaining contract. Judge Haynsworth's *Lowry* majority opinion noticeably avoids mention of *Mearns* even though the dissent points to it.

Thus, not only is there a conflict between the majority opinion and rationale of national labor policy in other cases, herein discussed, but the applicable rule in the Fourth Circuit itself, by its majority opinion, is beclouded and uncertain.

The dissent's second ground for challenge of the majority's opinion, evincing clearly its error, relates to the Act's Section 302(c). Though this statute expresses the conditions under which Congress authorized agreements establishing industrial trust funds, and despite the dissent's emphasis thereon, the majority opinion ignores it, significantly failing to explain its lack of pertinency to the instant situation.

The dissent, regarding the statute as an assurance that employees are knowledgeable as to welfare benefits to which they are entitled, notes Section 302(c)(5)

(B) required "the detailed basis on which such payments are to be made" must be "specified in a written agreement with the employer" (A. 8a) and appropriately observes such protection is incomplete, unless "the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing". Since, as the dissent borrows from *Benedict* (361 U.S. 469), royalty payments are an indirect method of compensating employees, unless reliance may be had upon the written agreement, employees are "deceived if the publicly declared, written agreement may be sapped by a secret compact" (A. 9a). In *Benedict*, too, this Court speaking of the same national labor contract, observed "this is an industry-wide agreement involving many promisors" (361 U.S. 469), which reflects the merit in the dissent's observation that written delineation of royalty payments is necessary to employers in an industry-wide bargaining situation, to enable them to know "when someone is paying less" royalty than others. Pertinently, the dissent notes that if one signing a written agreement may be permitted to say, "Yes, we have obediently put it in writing, but we did not mean it", then the scheme of financial aid and security to employees from welfare funds for problems of unemployment, illness, old age and death "could be reduced to chaos by a succession of such defenses" as Lowry relies upon herein, "bringing in its train a host of social evils". (A. 9a)

The majority holding that a signatory may be absolved of his written obligation to pay royalties to the trust fund by oral proof that the agreement was merely pretensive is at war with, and a glaring departure, from this Court's recognition in Benedict (361 U.S.

468-9) that a signatory to the industry-wide coal agreement "entered into a long-term relationship" and assumed responsibility for the Fund's soundness and its management.

As a third and final point of disagreement, the dissent avows, and the majority denies, that even if an oral agreement, said to be the "real contract", could be relied upon by Lowry in a suit by UMW, it could not be asserted as against the Trustees (A. 11a).

Without regard that Trustees' rights and Lowry's obligations are contained in an irrevocable trust, created pursuant to Section 302(c) in a bargaining agreement for employees in an entire industry, and despite this Court's holding in *Benedict* that "This collective bargaining agreement . . . is not a typical third-party beneficiary contract" (361 U.S. 459, 468), and contrary thereto, the majority opinion argues that Trustees' rights, being derivative, depend "upon the real agreement between the operator and the union" as third party beneficiaries (A. 5a). Appropriately the dissent points to this Court's holding in *Benedict* (361 U.S. 465) that the trust fund "is in no way an asset or property of the union" but is so independent of the union that a signatory employer was not permitted to use a money judgment against the union as a set-off to a judgment against the employer in Trustees' favor (A. 11a-12a). Logically, and with substance, the dissent declares (A. 12a), "The Trust Fund's obligation to pay benefits to Lowry's employees could not be affected by secret understandings between the coal company and the union; neither may the employer's obligation to pay royalties to the Trustees be diminished by clandestine arrangements between the employer and the union".

Benedict emphasized that the trust created in this industry-wide agreement was to provide security for employees and their families (361 U.S. 468). The grossness of the Fourth Circuit's error is manifest by its utter unconcern and lack of consideration for these ultimate beneficiaries. Actually, the majority opinion effectuates a burden that must be imposed in final analysis upon employees as the Fund's ultimate beneficiaries, innocent of any wrongdoing, who produced the coal from which flows Lowry's obligation to pay the royalty upon such production. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 466. The dissent aptly argues that a trust which may be impaired by secret agreements is "at war with the law's underlying policy". Even if Lowry could be regarded as innocent of wrongdoing, which Trustees deny, as between himself and Trustees (who stand in the shoes of employees as the ultimate beneficiaries, *U. S.* v. *Carter*, 353 U.S. 210, 220), *Lowry* is subject to the rule that when one of two innocent parties must suffer by the act of a third person, he, who by his act has enabled such third person to cause the loss, must sustain it. *Eliason* v. *Wilborn*, 281 U.S. 457; *Farmers Nat. Bank & Trust Co.* v. *Flexible Truck Corp.*, 3 Cir., 81 F. 2d 541; *NLRB* v. *Industrial Cotton Mills*, 4 Cir., 208 F. 2d 87, 91.[14]

---

[14] In a footnote the majority observes that "One can imagine circumstances in which a pretensive agreement between the union and a mine operator might induce action by the Trustees or employees to their detriment . . . No such circumstances are developed on this record." (A. 6a, fn. 5). The dissent responds that "The simple answer is that . . . detriment is inherent in the frustration of Trustees' and employees' rights . . ." (A. 11a). Further, Trustees submit it is difficult to understand the majority's statement in light of the uncontroverted facts appearing herein on the issue of ratification, which are summarized in the dissent (A. 6a).

Further, the majority's preference of the pretensive contract rule over national labor policy invites the textual recitals found in Wigmore on Evidence, 3d Ed., Vol. IX, p. 16:

> "When the document is to serve the purpose of mere sham, this principle in strictness exonerates the makers. But a just policy would seem to concede this only when the pretense is a morally justifiable one (as, to calm a lunatic or to console a dying person). When it is *morally beyond sanction*, or aims at *an evasion of the law*, or *a deception of other persons*, by intention of the parties, that intention will not be given effect . . ."[15]

CONCLUSION

For the foregoing reasons, Petitioners pray that this Petition for Writ of Certiorari should be granted and that such a Writ issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered in said Case No. 8298 on September 16, 1961, as aforesaid.

Respectfully submitted,

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.
Washington 5, D. C.

CLYDE Y. CRIDLIN
Jonesville, Virginia

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia

Attorneys for Petitioners

---

[15] The emphasis placed upon the words "*a deception of other persons*" is supplied. The other italicized words are those of the author.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8298

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Appellees*,

v.

F. ARNOLD LOWRY, individually and trading as LOWRY COAL COMPANY, *Appellant*.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.
TED DALTON, District Judge.

(Argued April 10, 1961. Decided September 16, 1961.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

HAYNSWORTH, Circuit Judge:

Summary judgment was entered for the plaintiffs in this suit by the Trustees for the Welfare and Retirement Fund of 1950 (United Mine Workers of America) against a mine operator for "royalty" payments at the rate of forty cents per ton of coal mined by the defendant.[1] We think the summary judgment was inappropriate in the light of the factual issues tendered.

---

[1] Lewis v. Lowry, W.D. Va., 190 F. Supp. 490.

From May 1955 to August 1958 the defendant was engaged in a strip mining operation in Harlan County, Kentucky. He employed three or four men at a time in the operation, and during the entire period seven different individuals were employed by him in the work.

The defendant claims that shortly after the operation commenced, a representative of the United Mine Workers, Floyd, came to the job and demanded that he sign the National Bituminous Coal Wage Agreement of 1952 with its amendments. At that time, the defendant had only three employees, only one of whom, he claims, was a member of the U.M.W. Nevertheless, the defendant signed the agreement and later signed the subsequent agreements of 1955 and 1956. Though he admits that Floyd made no threats of any kind to him, he claims that he was duressed into signing these agreements because of his conviction, based upon violence in Harlan County, Kentucky in previous years, that, if he did not do so, he and his employees would suffer injury to their persons or their property. Perhaps inconsistently, but more importantly, the defendant claims that before signing the first agreement he explained to Floyd that he could not pay a royalty of forty cents a ton or the union wage scale, and that Floyd prevailed upon him to sign the agreement as a mere formality, but with the clear understanding that he would not be bound by it. The defendant says that he operated on that basis during the three years preceding 1955, and that it was recognized by Floyd that the defendant could not afford the wages and royalty payments specified by the national agreement, and that he was not expected to pay them.

The defendant also says that in performance he did not pay the wages required by the national agreement, that questions affecting working conditions were settled on the scene, and that he sent monthly checks to the plaintiffs in amounts which he felt he could afford and without regard to the tonnage of coal mined, this being

in accordance with his claimed understanding with Floyd. These monthly payments to the plaintiffs were in small, even amounts. Seven of them were for $120 each, two of them were for $140 each, three of them were for $200 each, three of them were for $100 each, and the remainder were for similar, even, moderate sums. The total of these payments aggregated $3,264, and the defendant suggests that neither the plaintiffs nor anyone else could have supposed that such even figures could have been based upon actual coal production. He points to his actual production figures which when computed for each month to a fraction of a ton in tenths and multiplied by forty cents a ton, would invariably produce an odd dollar amount for the royalty payment.

The plaintiffs claim that payments aggregating $52,795.40 should have been made to them and seek the recovery in this action, after crediting the defendant with the $3,264 he paid, of $49,531.40.

On summary judgment, the plaintiffs concede, as they must, that Floyd did and said everything that the defendant says he did and they accept the other facts asserted by the defendant.

The plaintiffs stand on the parol evidence rule and upon a theory that the policy of the National Labor Relations Act gives some added protection to labor agreements attacked as sham.

Before we give consideration to the legal issues tendered, we think the factual situation should be more fully developed. The defendant seeks to bring himself within the usual rule that an agreement which is purely pretensive and delivered with no intention that it is to be binding upon either party may be shown by parol evidence to have created no contractual obligations.[2] It may be a

---

[2] Lewis v. Mears, W.D. Pa., 189 F. Supp. 703; and see Burke v. Dulaney, 153 U.S. 228, 14 S. Ct. 816, 38 L. Ed. 698; In re Hicks & Son, Inc., 2 Cir., 82 F. 2d 277.

salutary limitation upon the rule that the bare assertion of the party to be bound is not enough to show that the purported contract was a pretense and a sham,[3] but here the defendant claims corroboration in the circumstances of his performance.

On the present record we think the facts are not sufficiently established to determine whether the situation is governed by the rule which denies enforcement of pretensive agreements or by the rule which forecloses the use of parol evidence to establish a contemporaneous oral agreement to vary the terms of a valid contract.

It is suggested, however, that a remand would be purposeless, and that the usual rule, which permits a party to show the real agreement, notwithstanding the existence of a pretensive writing, is inapplicable to collective bargaining agreements. The contention is founded principally upon that provision in the National Labor Relations Act[4] which requires that a collective bargaining agreement be reduced to writing if requested by either party. We find, however, no such broad and collateral effect of the statutory provision.

The requirement that collective bargaining agreements be reduced to writing came into the Act after a history of refusal by some employers to make a memorial of agreements reached in collective bargaining negotiations. The Congress was of the opinion that a refusal to record an agreement reached was not the sort of good faith bargaining required by the Act. The requirement, however, is directed to the real agreement of the parties. It does not make sacrosanct a pretensive agreement inconsistent with the real agreement reached in the collective bargaining process.

---

[3] Rock Ola Manufacturing Corporation v. Wertz, 4 Cir., 282 F. 2d 208.

[4] 29 USCA § 158 (d).

If negotiators in a collective bargaining session should arrive at a complete agreement on the eve of April Fool's Day and, out of a perverted sense of humor, should reduce to writing, sign, and distribute a pretensive agreement far from the real agreement they had reached, surely either party could show that the pretensive agreement was in fact pretensive, and the right of each to require that the real agreement be reduced to writing would be preserved. The requirements of the Act are directed to the protection of the real agreement of the parties and not to alteration of accepted principles governing proof of the terms of the real agreement.

If, therefore, it should be made to appear that the union, for the sake of its relations with the larger mine operators, or for any other reason, insisted upon execution by the small operator of an agreement which in fact was pretensive and not the real agreement of the parties, nothing appears in the federal statutes which would prevent disclosure and proof of the real agreement between the union and the mine operator.

Finally, it is suggested that the plaintiffs, the Trustees of the Welfare and Retirement Fund, may have some greater right to enforce a pretensive agreement than would either of the immediate parties to it. The rights of the trustees, however, are entirely derivative. Their right to recover contributions from the mine operator is dependent entirely upon the real agreement between the operator and the union. The trustees have no independent right to insist that an operator make any contribution to the fund, or that it do so on the same basis and under the same formula that other operators contribute. The trustees are the third party beneficiaries of the real agreement between the union and the operator, which they may enforce in accordance with its terms, but the fact that the suit is brought for the benefit of the third party beneficiaries would not foreclose a defense that there was no

contract or that the writing upon which the complaint is based is not, in fact, the real agreement between the operator and the union.[5]

The judgment will be reversed and the case remanded for further proceedings.

Reversed and remanded.

SOBELOFF, Chief Judge, dissenting:

The District Court's action was sound and its judgment should not be disturbed.

Remand to the District Court is worse than useless since it is for the purpose of establishing a legal irrelevancy. This course is not justified because the only possible result of a trial on the issue of "sham contract" would be to ascertain facts which could constitute no defense.

Lowry became a party to the industry-wide collective bargaining agreement which obligated him to make royalty payments to the Trustees of the Welfare and Retirement Fund at the rate of $0.40 per ton. He regularly paid the fixed amount upon the number of tons he reported to the Trustees, reducing the total payments by the simple expedient of understating the tonnage in each of twenty-five payments made during the period in question. When the Trustees discovered from his reports to other agencies that his production was much greater than he had accounted for to the Trustees, they demanded payment of the difference due. Lowry did not interpose the present defense of "sham agreement," but sought to defend the correctness of the remittances made by him. He would not, however, agree to an inspection of his production rec-

[5] One can imagine circumstances in which a pretensive agreement between the union and a mine operator might induce action by the Trustees or employees to their detriment. In such a situation an estoppel might arise or the union and the employer might be held responsible for the losses in a tort action. No such circumstances are developed on this record.

ords, either by a certified public accountant of his own choice or by accountants from the Trustees' office. It happens that each of his seven employees whose names Lowry remembered in his deposition had been certified by him from time to time to collect, and did collect, benefits from the Trust Fund.

However, my dissent is based not upon the defendant's lack of equity, but upon broader grounds, for this is not just a small case involving a few miners. If the present employer is permitted to circumvent his written collective bargaining agreement, the effects will be industry wide.[1]

There are three reasons why the defendant's allegations fail to constitute a defense to the suit by the Trustees. First, the statute authorizing agreements to establish industrial trust funds, properly interpreted, requires that such agreements shall be in writing. Second, broadly as a matter of federal labor law, the so-called "sham" exception to the parol evidence rule should not be allowed in suits under collective bargaining agreements. Third, even if a private oral agreement, said to be the "real contract", could be relied upon by Lowry in a suit by the union, it cannot be asserted as against the Trustees.

---

[1] The present case involves no "April Fools' Day" joke, but is one of a series of attempts by coal operators over the nation to renege on their agreed-upon obligations with respect to the Union Welfare and Retirement Fund. For other cases where coal operators have attempted, unsuccessfully, to escape the payment of royalties to the Welfare Fund, some of them involving the same contentions as in the instant case and some involving different ones, see: *Lewis* v. *Fentress Coal and Coke Company*, 160 F. Supp. 221 (M.D. Tenn., 1958), aff'd 264 F. 2d 134 (6th Cir., 1959); *Lewis* v. *Mearns*, 168 F. Supp. 134 (N.D. W. Va., 1958), aff'd 268 F. 2d 427 (4th Cir., 1959); *Lewis* v. *Quality Coal Corporation*, 270 F. 2d 140 (7th Cir., 1959), cert. denied 361 U.S. 929 (1960); *Lewis* v. *Cable*, 107 F. Supp. 196 (W.D. Pa. 1952); *Lewis* v. *Hixson*, 174 F. Supp. 241 (W.D. Ark., 1959); *Lewis* v. *Kerns*, 175 F. Supp. 115 (S.D. Ind., 1959); *Lewis* v. *Mill Ridge Coals, Inc.*, 188 F. Supp. 4 (E.D. Ky., 1960); *Lewis* v. *Young & Perkins Coal Company*, 190 F. Supp. 838 (W.D. Ky., 1960); *Lewis* v. *Gilchrist*, ... F. Supp. .... (N.D. Ala., decided April 6, 1961). For one case upholding a contention similar to that of the defendant in the present case, see *Lewis* v. *Mears*, 189 F. Supp. 503 (W.D. Pa., 1960).

I.

In section 302 of the Labor Management Relations Act,[2] Congress showed a concern for the abuses accompanying the growth of the industrial trust funds. Primarily, it was feared that if the management of the funds were left entirely in the discretion of union officials, the money contributed by employers and by employees might not be used for welfare purposes. As Senator Taft said, "Unless we impose some restrictions, we shall find that the welfare fund will become merely a war chest for the particular union * * *."[3] One of the safeguards imposed by the act is that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer."[4] According to the law's framers, the primary purpose of this provision was to enable employees to know what they were entitled to receive in welfare benefits and to be able to bring suit against the Trustees if necessary.

Literally read, section 302(c)(5)(B) may be thought to require that only the terms of the payments to the employees be in writing. Nevertheless, the protection of the employees is not complete unless the statute is read to require as well that the terms on which payments are to be made into the Trust Fund be similarly stated in writing. Congress could not have intended to safeguard against the improper use of money once it has been contributed to the fund, but not against evasion of the primary obligation to contribute.[5]

Further, it would be inconsistent to read the statute to require that the agreement as to terms of payment to the

---

[2] 61 Stat. 157 (1947), as amended, 29 U.S.C.A. § 186 (Supp. 1960).

[3] 93 Cong. Rec. 4747 (1947).

[4] Labor Management Relations Act § 302(c)(5)(B), 61 Stat. 157-58 (1947), as amended, 29 U.S.C.A. § 186(c)(5)(B) (Supp. 1960).

[5] See *William Dunbar Co.* v. *Painters & Glaziers Dist. Council*, 129 F. Supp. 417, 423 (D.C. D.C., 1955).

fund be in writing and yet to permit an employer to claim the "sham" exception to the parol evidence rule. The royalty payments are an indirect method of compensating the employees,[6] and they have a right to know exactly what they are receiving for their services. They also have a right to know how well their union negotiators represented their interests. They are being deceived if the publicly declared, written agreement may be sapped by a secret compact. In addition, the establishment of this type of trust fund is generally made on an industry-wide basis. If some employers secretly contribute less than their shares, other employers may be forced to contribute more to enable the fund to meet its obligations.[7] Assuming that different royalties may be charged different employers, the other employers are at least entitled to know when someone is paying less per ton than they are. If then Congress has required that the agreement be reduced to writing, it cannot be supposed to have contemplated that a party may come into court with the defense, "Yes, we have obediently put it in writing, but we did not mean it." The salutary scheme to cushion the financial impact on employees and their families of unemployment, illness, old age and death could be reduced to chaos by a succession of such defenses as that attempted here, bringing in its train a host of social evils.

II.

In respect to ordinary commercial contracts the high position accorded to written agreements, as witnessed by the parol evidence rule itself, may under some circumstances yield to the "sham" exception.[8] Nevertheless, as a

---

[6] *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 469 (1960).

[7] See *Lewis* v. *Benedict Coal Corp.*, *supra* at 469 (1960).

[8] The parties are in disagreement as to whether under Kentucky law, if applicable, the "sham" exception to the parol evidence rule is recognized. I find it unnecessary to decide this.

matter of substantive labor law, courts should not permit the exception.

A collective bargaining agreement has been called a "generalized code"[9] for the industry to which it applies, and has been likened to a "charter instrument of a system of industrial self-government, like words in a statute."[10] If these are valid concepts, a union and an employer can no more make covert exceptions to the contract than a legislative body could to a statute which it adopts. Both are frauds upon the constituencies concerned. This is not to say that a collective bargaining agreement may never be oral, but where the parties have put it into writing, as in the usual case, it may not be varied by a contradictory oral agreement.

The union is not bargaining for itself alone, but as a representative of employees, and sometimes of others such as the Trustees in the instant case. It is imperative that the employees and other direct beneficiaries have a written embodiment of their rights and duties which can be ascertained by all. The public also has a right to know precisely what was agreed upon. If this "sham" exception is recognized, none of these interests will have any idea what the terms of the "real" collective bargaining contract are.

We must have regard for the spirit of the legislation. Section 8(d) of the Labor Management Relations Act[11] has recognized the importance of having a collective bargaining contract in writing by providing that bargaining in good faith includes a willingness to embody the agreement in writing at the request of the other party. See *H. J. Heinz*

---

[9] *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) (Douglas, J.).

[10] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). See Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 22-36 (1958).

[11] 61 Stat. 142 (1947), 29 U.S.C.A. § 158 (d) (1956).

Co. v. *N.L.R.B.*, 311 U.S. 514, 523-26 (1941). A written labor agreement settles questions that if left unsettled could lead to industrial strife. Its purpose is to avoid strikes, walkouts, workstoppages and the like. If such written contracts can be nullified whenever the employer and union come to some other secret oral agreement, the purpose of the contract as an instrument of industrial peace may be frustrated.[12]

III.

Even if it be assumed that in a suit by the union rather than the Trustees a sub-rosa understanding could be asserted by the employer, to allow the defense as against the Trustees would tend to undermine the statutory scheme for the creation of an irrevocable trust for the employees. The plan is one sponsored jointly by industry and labor and approved by Congress. The fund is jointly administered by representatives of employers and labor along with a neutral third party. If would be an unbearable incongruity, at war with the law's underlying policy, to allow the trust fund to be eroded in the manner proposed, for what kind of trust is it that leaves the dooor open to impairment by secret agreements, even those participated in by a donor?

The Supreme Court in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 465 (1960), pointed out that a trust fund is in "no way an asset or property of the union." See 93 Cong. Rec. 4678 (1947) (remarks of Senator Ball). In that case the trust fund was considered so far independent of the union that although a money judgment had been

---

[12] The majority opinion suggests in footnote 5 that an employer might be estopped from asserting an oral understanding with the union contradicting th ir written agreement if it were shown that the Trustees or employees acted to their detriment. The simple answer is that specific detriment to these third parties is not required to be shown to invoke the rule against secret evasion of the written agreement because detriment is inherent in the frustration of Trustees' and employees' rights which has been fully pointed out above in the text.

rendered in favor of the employer against the union, the employer was not permitted to use it as a set-off to a judgment against the employer in favor of the trustees. The considerations bearing on the protection of the interests of beneficiaries, which were stressed in *Benedict*, apply in logic and common sense with no less force here. Royalty payments to the Trustees may not be curtailed by private oral agreements between an employer and a union, any more than they were permitted to be reduced by damage claims of the employer against the union. The Trust Fund's obligation to pay benefits to Lowry's employees could not be affected by secret understandings between the coal company and the union; neither may the employer's obligation to pay royalties to the Trustees be diminished by clandestine arrangements between the employer and the union.

IV

The court's opinion treats the defense of coercion as frivolous, and with this I fully agree. No threats are claimed. The mere fear that if one will not sign the agreement there will be a strike or walk-out is not the kind of coercion that a court will recognize as sufficient to invalidate an agreement. This is elementary.[13] Certainly no remand is warranted to take testimony in support of this "defense."

For the above reasons, I think that the order of the District Court should be affirmed. Remand erroneously implies that if the facts that have been asserted could be established, they would constitute a valid defense. With this I do not agree.

---

[13] See, *e.g.*, *Lewis* v. *Quality Coal Corporation*, 270 F. 2d 140 (7th Cir., 1959); *Lewis* v. *Kerns*, 175 F. Supp. 115 (S.D. Ind., 1959).

Judgment

Filed and Entered September 16, 1961.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8298

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, *Appellees*,

v.

F. ARNOLD LOWRY, individually and trading as LOWRY COAL COMPANY, *Appellant*.

APPEAL FROM the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Virginia, at Abingdon, for further proceedings consistent with the opinion of the Court filed herein.

MORRIS A. SOPER
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

I dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

Filed Sep. 16, 1961
R. M. F. WILLIAMS, JR.
Clerk

APPENDIX B

Section 8(d), Labor Management Relations Act, 1947 [29 USCA 158(d)]:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . . "

Section 302, Labor Management Relations Act, 1947 [29 USCA 186]:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of em-

ployees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; . . . "

Federal Rules of Civil Procedure, Rule 56:

"Rule 56. Summary Judgment.

"(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a

summary judgment in his favor upon all or any part thereof.

• • • • •

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 20 1961
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 573.

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America Welfare & Retirement Fund of 1950,
Petitioners,

vs.

F. ARNOLD LOWRY,
individually, and trading as Lowry Coal Company,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT T. WINSTON,
Norton, Virginia,

JAMES S. GREENE, JR.,
Harlan, Kentucky,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5547

TABLE OF CONTENTS.

Question Presented . . . 1

Statement of the Case . . . 2

The Argument . . . 6

The fact that the subject matter of this case pertains to collective bargaining contracts does not make it of such importance as to circumvent the requirement of finality as a prerequisite to review . . . 6

Conclusion . . . 10

Appendix. Opinion in Lewis v. Mears . . . 11

TABLE OF AUTHORITIES.

Cases.

Cobbledick v. United States, 309 U. S. 323 . . . 8

Lewis v. Mears, D. C. Pa., 189 F. Supp. 503, aff'd 3 Cir., — F. 2d — October 11, 1961 . . . 9, 10

Radio Station WOW, Inc. v. Johnson, 326 U. S. 120 . . . 7

Sartor v. Arkansas Natural Gas Corporation, 321 U. S. 620 . . . 7

Federal Rules of Civil Procedure.

Rule 56 . . . 7

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 573.

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE,
as Trustees of the United Mine Workers of America Welfare & Retirement Fund of 1950,
Petitioners

vs.

F. ARNOLD LOWRY,
individually, and trading as Lowry Coal Company,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, F. Arnold Lowry, individually, and trading as Lowry Coal Company, in opposition to the petition for a writ of certiorari filed herein, respectfully represents:

QUESTION PRESENTED.

Where the district court, prior to trial, sustained plaintiffs' motion for summary judgment, finding that there was no issue to be resolved as to any material fact, and, upon appeal, the court of appeals reversed the case

and remanded it to the district court for trial, finding that there were factual issues to be determined, should certiorari be granted to the court of appeals prior to final judgment because the subject matter of the case pertains to collective bargaining contracts?

STATEMENT OF THE CASE.

The respondent, F. Arnold Lowry, resides at Pennington Gap, Virginia, and is engaged in the business of mining coal by the strip mining method (D. A. 9).* Prior to 1955, he had engaged in the coal business under a partnership arrangement known as the Smith & Lowry Coal Company (D. A. 30). On or about May 1, 1955, Lowry moved his stripping equipment upon a leasehold in Harlan County, Kentucky to commence strip mining operations at that point (D. A. 29). At that time, Lowry had only three employees, and only one of these was a member of the United Mine Workers of America; he and his men were in complete accord as to wages and working conditions and he was not operating under a union contract (D. A. 29).

While Lowry and his employees were moving his machinery upon the coal lease property, one Clarence Floyd, field representative for District 19, United Mine Workers of America, came to the mining site and demanded that Lowry sign a union contract (D. A. 29). There was no pretense by Floyd that he represented Lowry's employees, or that he knew these employees, or that he even knew how many employees were working for Lowry (D. A. 29). The contract offered by Floyd, and which was subsequently signed by Lowry, was a printed

---

* To avoid confusion, the same system of abbreviation to references as used in the petition for certiorari has been used in brief for respondent.

form contract, which had been negotiated at Washington, D. C., between the United Mine Workers of America and the large coal operators and associations, and was known as the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952 (P. A. 7, 8).

Lowry explained to Floyd that by reason of the small size of his operation, he could neither pay the union scale of wages nor pay the welfare royalty called for by the contract (D. A. 29). Floyd told Lowry to sign the contract and that would take the union off of his (Floyd's) neck, and that Lowry could pay whatever welfare royalty he was able to pay, and that it would be understood between them that the written contract was not binding on either party and was not to become effective, but was executed as a mere sham (D. A. 30). The subsequent contracts, being the amendment of September 1, 1955, and the amendment of October 1, 1956, were entered into between Lowry and Floyd with the same mutual understanding and agreement (D. A. 30).

Lowry and his employees did not follow the union scale of wages, but continued to mutually agree upon both wages and working conditions as they had previously done prior to May 1, 1955 (D. A. 30, 31). Lowry did not deduct union dues from the wages of his employees, but paid these dues himself (D. A. 23, 24). Neither the contract signed on or about May 1, 1955, nor any of the subsequent contracts, were executed as an inducement to get Lowry's employees to work for him, and the terms of these contracts were never considered to be effective as between Lowry and his employees (D. A. 31).

The field representative for the union, Clarence Floyd, at all times following May 1, 1955, knew that Lowry was not paying either union scale wages or the royalty welfare

payments as required by the signed contracts, and acquiesced therein, in compliance with their mutual understanding that the signed contracts were for show only and were never to become effective (D. A. 31).

Also, in accordance with the understanding which he had with Floyd, he sent monthly checks to the welfare fund in amounts which he felt he could afford and without regard to the tonnage of coal mined. These monthly payments were in small, even amounts. Seven of them were for $120.00 each, two of them were for $140.00 each, three of them were for $200.00 each, three of them were for $100.00 each and the remainder were for similar, even, moderate sums. The total of these payments aggregated $3,264.00, and no one could have reasonably supposed that these sums could have been based upon actual coal production (P. A. 2-5).

On February 16, 1959, this action was brought by the trustees of the welfare fund against Lowry, seeking to hold Lowry liable for welfare payments provided for in the signed contracts, and asking for recovery against him for the difference between the sums actually paid by him and the sums due according to the provisions of the signed contracts, which difference the district court found to be in the sum of $49,531.40 (D. A. 33, 34). As a defense to the suit of the trustees, Lowry pled that there was no legal delivery of the signed contracts as they were not intended to take effect as legal obligations, but, on the contrary, it was agreed between the parties thereto that these written instruments would never become effective, and, pursuant to such agreement, the terms of such instruments were never put in force and were disregarded by the parties (D. A. 6).

After taking and filing Lowry's deposition in discovery, and after certain interrogatories were served and

answered, the trustees moved the district court to enter summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, in their favor in the amount of $49,531.40, "on the ground that the pleadings, interrogatories and depositions filed in this action and the affidavits and exhibits attached hereto show that there is no genuine issue as to any material fact, and that the plaintiffs are entitled to judgment as a matter of law" (D. A. 28). The affidavit of F. Arnold Lowry, setting out the facts as hereinabove related, was filed in opposition to this motion for summary judgment (D. A. 29-32).

The district court sustained the motion for summary judgment, stating as follows: "The Court (although cautious and somewhat reluctant in granting summary judgment) having examined all the facts, is of the opinion that there is no material fact upon which minds could differ or from which varying inferences could be drawn" (D. A. 37).

Upon appeal to the court of appeals, the appellate court reversed the decision of the district court and remanded the case to it for further proceedings. The appellate court was of the opinion that there were factual issues which would necessarily have to be determined before a consideration could be given to the legal issues of the case (A. 1a-6a).

The opinion of the court of appeals was handed down on September 16, 1961. The trustees, without waiting for this decision to become final, have directly petitioned to this Court for a writ of certiorari to the appellate court.

THE ARGUMENT.

The fact that the subject matter of this case pertains to collective bargaining contracts does not make it of such importance as to circumvent the requirement of finality as a prerequisite to review.

The petitioners here propose that this Court permit them to circumvent the requirement of the federal judicial system of finality as a condition of review. Rather than to await the outcome of a trial upon the facts in the district court, as directed by the court of appeals, they have come directly to this Court seeking a petition for certiorari. If certiorari is granted, and upon submission of this case the decision of the court of appeals is affirmed, this case will not be at an end. Nor will this Court have heard the last from it. What will follow will be a trial in the district court, a subsequent appeal to the court of appeals, and then again one of the parties will be petitioning this Court for a writ of certiorari.

The trustees argue that review should be permitted in this case because the subject matter of this suit is collective bargaining agreements, that this is a matter of such great importance that it cannot await the orderly procedures established for appeal in the federal judicial system.

Respondent submits that there is nothing in this case of such an exceptional nature as to require this Court to grant review at this stage of the proceedings. There is nothing more involved here than that a district court, without a trial, sustained a motion for summary judgment based upon a finding that there was no material fact to be resolved; the court of appeals disagreed with the district court and found that there were factual issues which required a determination before the legal issues could be resolved, and it reversed the decision of the district court

and remanded the case to it for a trial upon these factual issues. The petitioners say that the district court was right and that the court of appeals was wrong, and that this Court should grant certiorari without a trial on the factual issues which the court of appeals found to exist.

This is primarily a case involving the applicability of Rule 56 of the Federal Rules of Civil Procedure (28 U. S. C.); the pertinent sections of this rule are set out in the appendix to the petition for certiorari (A. 15a, 16a). It is apparent that the court of appeals correctly applied this rule in accordance with the established principle of this Court "* * * that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try" (*Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620, 627).

As to the pronouncement that it is in only very few situations, and where intermediate rulings may carry serious public consequences, that this Court will depart from the requirement of finality for federal appellate jurisdiction, this Court stated as follows in the case of *Radio Station WOW, Inc., v. Johnson*, 326 U. S. 120, 123, 124:

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. See Heike v. United States, 217 U. S. 423, 54 L. ed. 821, 30 S. Ct. 539; Cobbledick v. United States, 309 U. S. 323, 84 L. ed. 783, 60 S. Ct. 540; Catlin v. United States, 324 U. S. 229, ante, 911, 65 S. Ct. 631 (decided February 26, 1945). This requirement has the support of con-

> siderations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction."

And again in the case of *Cobbledick v. United States*, 309 U. S. 323, 324-326, this Court reviewed the reasons and necessity for this condition to the right of appeal in the following manner:

> "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. Not until 1889 was there review as of right in criminal cases. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of

a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal. Cogen v. United States, 278 U. S. 221, 73 L. ed. 275, 49 S. Ct. 118.

"In thus denying to the appellate courts the power to review rulings at nisi prius, generally, until after the entire controversy has been concluded, Congress has sought to achieve the effective conduct of litigation. For purposes of appellate procedure, finality—the idea underlying 'final judgments and decrees' in the Judiciary Act of 1789 and now expressed by 'final decisions' in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system."

While the trustees urge that this case is of such importance as to come within one of those very few situations where intermediate rulings may carry serious public consequences, and that, therefore, there should be a departure made in this instance from this requirement of finality, it is to be noted that the one case in their brief, which is referred to as being the lone successful effort of coal operators to "renege on their agreed-upon obligations," *Lewis v. Mears*, D. C. Pa., 189 F. Supp. 503, aff'd 3 Cir., — F. 2d — October 11, 1961, has been finally adjudicated (footnote to petition, p. 10). However, from the footnote reference to this case in the petition, it appears that on November 13, 1961, the trustees filed for rehearing in the Court of Appeals for the Third Circuit, for which reason the opinion has not yet been reported. A copy of the *Mears* opinion, written by Judge Kalodner, comprises the appendix to this brief. A reading of this opinion discloses that the same general proposition which is urged in the petition

for certiorari in the instant case was urged before the Court of Appeals for the Third Circuit in the *Mears* case, and rejected by that court, that is, that the national labor policy is such as to preclude the admissibility of any testimony concerning an oral agreement establishing that the written collective bargaining agreement sued upon had never become legally effective. The trustees certainly have reached the proper stage of proceedings in the *Mears* case to seek review in this Court, and if the subject matter of this case and the *Mears* case is of such great consequence as urged, then there is no reason why they cannot submit to the requirements of the federal judicial system and bring such matter to the attention of the Court by petition for certiorari in the *Mears* case, rather than to seek to arrest the orderly progress of this case toward a conclusion of the entire controversy.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT T. WINSTON,
Norton, Virginia,
JAMES S. GREENE, JR.,
Harlan, Kentucky,
Counsel for Respondent.

APPENDIX.

Opinion in Lewis v. Mears.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 13,502.

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE,
AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Appellants,

v.

EDWARD MEARS,
Individually and Trading as
MEARS COAL COMPANY,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 19, 1961

Before GOODRICH, McLAUGHLIN and KALODNER, *Circuit Judges.*

OPINION OF THE COURT

(Filed October 11, 1961.)

By KALODNER, *Circuit Judge.*

The plaintiffs, having suffered judgment against them below on a jury's verdict and their motions for a directed verdict and/or a new trial having been denied,[1] have brought this appeal raising these issues:

(1) Did the trial judge err in permitting parol

---

[1] The Opinion of the District Court is reported at 189 F Supp. 503 (W. D. Pa. 1960)

evidence to the effect that a Wage Agreement allegedly entered into between the defendant and the United Mine Workers of America ("Union") which required the defendant to make certain payments to the plaintiffs' Welfare and Retirement Fund was never consummated because a condition precedent to its consummation never occurred; and

(2) Did the trial judge err in his refusal to hold as a matter of law that (a) the defendant had ratified the contract, and (b) the defendant was estopped from maintaining that the contract was never consummated?

The plaintiffs, citizens of states other than Pennsylvania, are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 ("Fund"). The defendant is Edward Mears, individually and trading as Mears Coal Company, a resident of Marion Center, Indiana County, Pennsylvania. Jurisdiction exists by reason of diversity.

The Fund was created by the National Bituminous Coal Wage Agreement of 1950. The latter, as amended effective October 1, 1952, provided that each coal operator entering into it covenanted to pay into the Fund forty cents for each ton of coal produced for use or sale. This Agreement will hereinafter be referred to as the "1952 Agreement."

In December 1956 the plaintiffs brought suit against the defendant in the District Court of the Western District of Pennsylvania alleging that he had entered into the 1952 Agreement on October 31, 1952 and as a consequence was obligated to pay into the Fund forty cents on each ton of coal produced between October 1, 1952 and December 31, 1955 and that he had not discharged that obligation.

At the trial the defendant was permitted to testify, over the plaintiffs' objection, that when in October 1952

he signed the 1952 Agreement, as well as the 1950 and 1951 Agreements, he did so on the representation of Union's bargaining representative, Arthur Anderson, that the 1952 Agreement "wouldn't be a contract" until defendant "got the contract back signed and fully executed" by the Union. The defendant further testified that he had never received a copy of the 1952 Agreement signed by the Union and on this score it must be noted that the plaintiffs made no denial of that circumstance. The testimony established that the 1952 Agreement was signed by the Union subsequent to the time that the defendant signed it.

Anderson denied that he had agreed with the defendant that the 1952 Agreement would not become effective until it was signed by Union and a copy returned to defendant. He also testified that the defendant had signed the 1950 and 1951 Agreements on May 15, 1952, and not in October 1952 as defendant claimed.

The trial judge, pursuant to Rule 49(a), Fed. R. Civ. P., 28 U. S. C. A., submitted to the jury in the first two Interrogatories the specific issue as to whether Anderson had agreed with the defendant that the 1952 Agreement "would not become valid and enforceable" until the defendant had received a copy of it executed by the the officers of the Union.[2] The jury answered "Yes" to this Interrogatory.

---

[2] The first Interrogatory read as follows:

"Did Arthur Anderson agree with the defendant Mears that the written instruments, Exhibits 1, 2 and 3, at the time they were signed by Mears, would not become valid and enforceable contracts until Mears received copies thereof executed by the officers of the United Mine Workers of America?"

The record makes clear that Exhibit 1 was the 1950, Exhibit 2 was the 1951 Agreement and Exhibit 3 was the 1952 Agreement.

(Continued on following page)

The second Interrogatory presented to the jury the issue as to whether the defendant had in writing advised the plaintiffs in April 1953 that he had cancelled the contract with the Union. The jury's answer to this Interrogatory was "No."

The issues submitted to the jury were limited to those presented in the two Interrogatories and the record discloses, as the trial judge noted in his Opinion, 189 F. Supp. 505, neither counsel requested "that any other issue of fact be submitted to the jury."

It must be noted, however, that the trial judge in his charge to the jury directed attention, as bearing upon the issue whether a binding contract had been entered into, to testimony adduced by the plaintiffs that the defendant had signed the 1950 and 1951 Agreements on May 15, 1952 and not in October 1952 when defendant said he had signed these Agreements along with the 1952 Agreement; that one Blizzard, an employee of the Fund, had on May 20, 1952 sent forms to the defendant relating to the tonnage payments and that the defendant had completed these forms and made payment in accordance therewith during the intervening months up to April 5, 1953;[3] and that the ledger records of the Fund evidenced royalty payments by the defendant as early as July 9, 1952.

(Continued from preceding page)

It affords, however, no explanation as to why the 1950 and 1951 Agreements were included in the Interrogatory since the action here was premised on the 1952 Agreement. The District Court's Opinion throws no light on the inclusion of the two earlier Agreements. It stated, however, 189 F. Supp. 505, that "the interrogatories were submitted to counsel prior to their closing address to the jury, and neither counsel made any objection thereto. * * *"

[3] It was stipulated by the parties prior to the trial that the defendant had paid royalties on tonnage produced between September 1, 1952 and February 28, 1953, during October 1952 to March 1953, inclusive.

Anent the foregoing the trial judge in his charge also called attention to the defendant's testimony that "although he had been paying royalties for a period prior to October, 1952, he did so not because he signed Exhibits 1 and 2 [the 1950 and 1951 Agreements] on May 15, 1952, but because he could not sell his coal unless he paid the royalties."

With respect to all this testimony the trial judge in substance instructed the jury that it must be weighed and evaluated in connection with the issue as to whether the defendant and Anderson had agreed that the 1952 Agreement (as well as the 1950 and 1951 Agreements), was not to become valid and binding until executed by the Union and a copy delivered to the defendant. At the same time the trial judge charged the jury that it was to consider all the other evidence adduced in arriving at an answer to the two Interrogatories.

Upon return of the jury's answers to the Interrogatories the trial judge advised the parties that he would postpone entry of judgment thereon in favor of the defendants until after oral argument on plaintiffs' motion for a directed verdict made prior to the close of the trial. Later, the trial judge denied plaintiffs' motion and subsequently denied their further motions "to reopen judgment and for a directed verdict" and for a "new trial." This appeal from the denial of these motions followed.

We will first direct our attention to the issue as to whether the trial judge erred in permitting parol evidence designed to establish that the 1952 Agreement was not to become a contract until the defendant had received a copy of it signed by Union.

Plaintiffs urge that the admission of this parol evidence violated both the parol evidence rule and the national labor policy. We do not subscribe to the plaintiffs'

view. It is clear that the parol evidence rule has no application to the facts of this case. The challenged testimony was introduced to prove that the alleged contract never existed.

It is well-settled that parol evidence is admissible to prove that a contract did not exist. In *Smilow v. Dickerson*, 357 Pa. 455 (1947), the Pennsylvania Supreme Court in so holding stated (p. 462):

> "In the leading English case of *Pym v. Campbell*, 6 El. & Bl. 370, it is said: 'The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible." (citing cases.)
>
> "It was said by Justice Harlan in *Burke v. Dulaney*, 153 U. S. 228 [1894]: 'The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract . . .,' and parol evidence was admissible to show that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations."

As to the plaintiffs' contention that apart from the parol evidence rule national labor policy precluded the admission of the defendant's testimony concerning his oral agreement with Anderson it need only be said that while it is true that the Supreme Court has held that the federal courts may "fashion a body of federal law for the enforcement of collective bargaining agreements," *Lewis v. Benedict Coal Corp.*, 361 U. S. 459, 470 (1960) and that national labor policy may require modification of the traditional rules of contract law in the case of these agreements, none of the cases cited by plaintiffs preclude the use of parol

evidence to establish that an effective acceptance was not communicated by the offeree to the offeror.

In our opinion national labor policy does not require the exclusion of parol evidence which shows the lack of an effective acceptance of an offer.

There remains for disposition the points raised by the plaintiffs that the trial judge erred in his refusal to hold as a matter of law that (1) the defendant had ratified the contract and (2) the defendant was estopped from maintaining that the contract was never consummated.

On the score of the foregoing it need only be said that the trial judge made factual findings, in accordance with the jury's answers to the Interrogatories,[4] that the elements necessary to support conclusions of law that ratification and estoppel existed were not established by the evidence. We cannot say that these factual findings were clearly erroneous. It would serve no useful purpose to dwell further on these points in view of their extensive discussion by the trial judge in his opinion.

For the reasons stated the judgment of the District Court in favor of the defendant will be affirmed.

---

[4] Rule 49 (a), Fed. R. Civ. P., 28 U. S. C. A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners*,

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners,*

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In his brief opposing the award of certiorari herein, Lowry does not dispute Petitioners' assertion (Pet. 12) that the Fourth Circuit's decision conflicts with the purposes, spirit and language of the Labor Manage-

ment Relations Act, 1947, and decisions of this Court, the Sixth Circuit and even the Fourth Circuit's *Mearns* v. *Lewis*, 4 Cir., 268 F. 2d 427.

Instead, Lowry's complaint (Br. 6) is that Petitioners seek to "circumvent the requirement of the Federal judicial system of finality as a condition of review". Not only does Lowry misconceive this Court's rule of review, but his complaint ignores *U.S.* v. *General Motors Corp.*, 323 U.S. 373 [cited in the Petition for Certiorari (p. 12)], as well as *Land* v. *Dollar*, 330 U.S. 731, wherein a Federal court of appeals had reversed a district court's dismissal of an injunction complaint with prejudice and had remanded the case, and wherein this Court observed that (330 U.S. 734, fn. 2):

> "Although the judgment below was not a final one, we considered it appropriate for review because it involved an issue 'fundamental to the further conduct of the case' ",

citing the *General Motors* case.

It is significant that whereas the district court found "there is no material fact upon which reasonable minds could differ or from which varying inferences could be drawn", the Fourth Circuit's majority does not profess there was error in the district court's finding, nor does it show the existence of a genuine issue of fact necessary if summary judgment is to be denied.

While the Fourth Circuit's majority remanded the case solely because "we think the factual situation should be more fully developed" (App. 3a),[1] it is further significant that Lowry did not contend either in the district court or in the Fourth Circuit, nor does

[1] This reference is to the Appendix to the Petition for Certiorari.

he contend in his opposition brief, that he has any additional facts to present upon remand that were not presented to the district court upon the motion for summary judgment.

If the Fourth Circuit's decision is permitted to stand and the case is retried upon remand, as the Fourth Circuit has directed, the district court will necessarily be under a compulsion to follow the legal principle expressed in the majority opinion. The admission of defendant's testimony dealing with his "sham contract" defense[2] would be over Petitioners' objection and would again invoke and involve Petitioners' contention that national labor policy forecloses the right of an operator signatory to an industry-wide collective bargaining agreement, containing an irrevocable trust for benefit of employees, from varying its terms and evading his obligation to the trust fund on the ground that the written agreement was a "sham" or pretensive agreement. Petitioners' motion for directed verdict would likewise involve the same inquiry.

In the event of a judgment adverse to Petitioners, the appeal to the Fourth Circuit would necessarily be an abortive one because of the majority's decision in the present case and a second petition for review to this Court would then involve the precise question now presented. Certainly, as this Court recognized in the *General Motors* and *Land* cases, the instant case involves an issue "fundamental to the further conduct of the case."

Even if the remand proceedings resulted in a judgment favorabl to Petitioners, the legal principle enun-

[2] Such defense would necessarily have to be consistent with Lowry's affidavit and depositions upon which the district court granted summary judgment.

ciated in the majority's opinion would remain undisturbed, the existing conflict between the majority's views and the decisions of this Court, the Sixth Circuit and the Fourth Circuit's *Mearns* case would remain unsettled, and the confusion in the Fourth Circuit because of the variant views expressed in the instant case by the Fourth Circuit and those approved by it in the *Mearns* case would continue, despite the fact, as Judge Sobeloff's dissent shows, the question now presented to the Court is a recurring one and is vital, not only in the administration of the collective bargaining agreement now before the Court, but in the processing of all labor agreements.

Cases cited by Lowry (Br. 7, 8) are inapposite. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123, 124, recognizes that there are rulings which warrant "a departure from this requirement of finality for Federal appellate jurisdiction". Moreover, *Johnson* concerned the review of a state court decision, and this Court carefully observed that Congress limited this Court's "power to intervene in State litigation only after 'the highest court of a State . . .' has rendered a 'final judgment or decree'" (326 U.S. 124). No such statutory limitation is applicable herein.

Nor is *Cobbledick* v. *U.S.*, 309 U.S. 323, 324-6, applicable, for therein this Court dealt, not with its power to review non-final judgments, but with the right of a Federal court of appeals to review, under the judicial code, a district court's order denying a motion to quash a subpoena duces tecum.[3]

---

[3] In *Cobbledick*, the Court said (309 U.S. 324): "The question is whether an order denying a motion to quash a subpoena duces tecum directing a witness to appear before a grand jury is included within those 'final decisions' in the district court which alone the circuit courts of appeal are authorized to review by § 128(a) of the Judicial Code (28 USCA § 225)."

Similarly without merit is Lowry's final argument that Petitioners should have sought review in this Court of *Lewis* v. *Mears,* DC Pa., 189 F. Supp. 503, aff'd 3 Cir., — F. 2d —, October 11, 1961 (cited in the Petition for Certiorari, p. 10). Petitioners' rehearing petition is still pending. Moreover the existence of the *Mears* case does not serve as a reason for this Court's denial of the instant petition; instead it emphasizes the necessity for this Court's granting the petition as a guide for the Third Circuit in the *Mears* case.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, Petitioners submit that the Writ as prayed for should issue.

Respectfully submitted.

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Attorneys for Petitioners.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JAN 10 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners*,

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CHISLIN,
Jonesville, Virginia.

M. E. BOLARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Petitioners*,

v.

F. ARNOLD LOWRY, Individually, and Trading as Lowry Coal Company

---

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' SUPPLEMENTAL REPLY TO BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners' Reply to the Brief in Opposition noted a rehearing petition was filed in *Lewis* v. *Mears*, DC, Pa., 189 Fed. Sup. 503, aff'd. 3 Cir., F.2d , 48 LRRM 3120, and was then still pending. On January 4, 1962, the Third Circuit *en banc* (8 Circuit Judges participating), *being equally divided*, denied the rehearing petition, noting, "There is not a majority of

the Court in favor of granting the petition for rehearing." However, in a dissenting opinion, Chief Judge Biggs declared the district court and the Third Circuit[1] "erred in holding that the terms of that Agreement might be nullified by an alleged oral prior or contemporaneous understanding that the terms of the Agreement should not be valid until it was delivered back to Mears."

The dissenting opinion notes that Circuit Judges Staley, Ganey and Smith "join in the views expressed in this opinion."

The dissenting Justices agree with Judge Sobeloff's dissent in *Lowry* (which is the subject of the instant petition for certiorari) that "the position taken by the majority emasculates the policy intended to be created by Congress in enacting Section 302(c)(5)(B) and vitiates the spirit of Section 8(d) of the Labor Management Relations Act".

Pointing to this Court's *Benedict* (361 U.S. 459, 470), the dissenting jurists declared "the federal courts in fashioning a body of federal common law for the enforcement of collective bargaining agreements * * * must shape that law so that such agreements cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union" and that "otherwise industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed."[2]

The sharp division of opinion among the Third Circuit's members and the lack of a majority vote therein

---

[1] Circuit Judges Goodrich, McLaughlin and Kalodner participated in the original hearing.

[2] The Per Curiam and dissenting opinions appear in Appendix A herein.

on the legal principle involved adds to the already existing conflict between the majority view in *Lowry* and the decisions of this Court, the Sixth Circuit and the Fourth Circuit's *Mearns* case, and the confusion in the Fourth Circuit, as pointed out in the petition for certiorari herein (pp. 12, 16-17). The Third Circuit's action on the rehearing petition in *Mearns* and the dissent above quoted emphasize the importance of this Court's settling the conflict, the confusion and the uncertainty existing on the question presented to this Court herein by its awarding the petition for certiorari.

Respectfully submitted,

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.,
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia,

Attorneys for Petitioners.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,502

JOHN L. LEWIS, HENRY G. SCHMIDT AND JOSEPHINE ROCHE, AS TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, *Appellants*

v.

EDWARD MEARS, Individually and Trading as MEARS COAL COMPANY

Opinion Sur Petition for Rehearing

(Filed January 4, 1962)

Present: BIGGS, *Chief Judge*, GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY AND SMITH, *Circuit Judges*

PER CURIAM

There is not a majority of the Court in favor of granting the petition for rehearing. Accordingly the petition will be denied.

BIGGS, *Chief Judge*, dissenting.

Putting to one side any contention that Mears ratified the 1952 National Bituminous Coal Wage Agreement, that he is estopped to deny that he was bound by it, or that the parole evidence rule was violated, the court below and this court erred in holding that the terms of that Agreement might be nullified by an alleged oral prior or contemporaneous understanding that the terms of the Agreement should not be valid until it was delivered back to Mears. The royalty payments provided for by the Agreement were "really another form of compensation to the employees". Lewis v. Benedict Coal Corp., 361 U.S. 459, 469 (1960).

As Chief Judge Sobeloff points out in his dissenting opinion in Lewis, Trustee, et al. v. Lowry, 295 F.2d 197 (4 Cir. 1961), the position taken by the majority emasculates the policy intended to be created by Congress in enacting Section 302(c)(5)(B) and vitiates the spirit of Section 8(d) of the Labor Management Relations Act, 29 U.S.C.A. § 186 (c)(5)(B) (Supp. 1960) and § 158(d). The federal courts in fashioning a body of federal common law for the enforcement of collective bargaining agreements, Lewis v. Benedict Coal Corp., *supra*, p. 470, must shape that law so that such agreements cannot be modified or nullified by covert conditions or stipulations entered into between the employer and the union. If it be otherwise industrial strife is sure to ensue and the stabilizing effect on labor relations of the Labor Management Relations Act will be destroyed.

For this reason I dissent from the order of this court denying rehearing en banc.

I am authorized to state that Judge Staley, Judge Ganey and Judge Smith join in the views expressed in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,
Petitioners,

v.

F. ARNOLD LOWRY, Individually, and Trading as LOWRY COAL COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.
Washington 5, D. C.

CLYDE Y. CHERLIN,
Jonesville, Virginia.

M. E. BUZZARDE,
511 Kanawha Valley Building,
Charleston, West Virginia,

Attorneys for Petitioners.

[illegible], D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 573

JOHN L. LEWIS, HENRY G. SCHMIDT, and JOSEPHINE ROCHE, as TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,
Petitioners,

v.

F. ARNOLD LOWRY, Individually, and Trading as LOWRY COAL COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950,[1] pray that this Court grant rehearing of its

[1] Herein called "Fund". "Petitioners" are also called "Trustees" herein.

order of January 22, 1962, denying the petition for writ of certiorari (U.S.), and in which order Chief Justice Warren, Mr. Justice Black and Mr. Justice Brennan noted they would grant the writ, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed herein on November 24, 1961.

REASON FOR GRANTING REHEARING

Though the petition for certiorari directed attention to a list of *decided* cases collated in Chief Judge Sobeloff's dissenting opinion in which other employers sought "to renege on their agreed-upon obligations with respect to" payments to the Fund,[2] Petitioners did not therein call the Court's attention that there are *currently pending* in federal district courts of West Virginia, of Kentucky and of Tennessee thirty-six cases (in addition to the instant *Lowry* case) wherein employers have asserted the "sham contract" defense against Petitioners' claims for delinquent royalties of almost $900,000.00.[3]

---

[2] See Appendix to the Petition for Certiorari, p. 7a, for such cases.

[3] The pending cases are as follows:

Name of Company	Amount
George A. Bryant & Sons Coal Co.	$ 19,946.01
E. Dick Burrow Coal Co.	23,560.00
Willis Flynn Coal Co.	21,350.48
Howard Higgins Coal Co.	12,452.15
R. B. Ivey Coal Co.	23,082.22
Will Land Coal Co and or Will Land & Sons Coal Co.	12,302.90
Charlie Martin Coal Co.	33,526.03
Patrick & Hampton Coal Co.	22,457.30

Heretofore certiorari was awarded "*because determination of the issue raised here will guide adjustment of a large body of similar claims now pending*" in *Alcoa S.S. Co., Inc. v. U. S.*, 338 U.S. 421, 423.[4] More recently, the Court granted certiorari in *Local*

Name of Company	Amount
Earl Patton Coal Co.	11,741.34
Hampton E. Patton Coal Co.	18,442.61
James Patton Coal Co.	36,564.30
J. W. Sanders Coal Co. and J. W. Sanders & Sons Coal Co.	6,124.48
J. A. Cordell Coal Co. and/or Cordell Coal & Constr. Co.	11,170.72
H. A. Daffron Coal Co.	13,692.71
M. T. Dixon Coal Co.	16,345.40
J. H. Graham Coal Co.	12,948.80
M. & T. Coal Co.	35,898.15
Marshall Meeks Coal Co.	46,113.36
W. T. Morrison Coal Co.	21,494.40
Hershel Myers Coal Co.	15,170.12
Waldo Myers Coal Co.	11,757.30
Edward Nunley Coal Co.	11,782.28
Leon Nunley Coal Co.	10,069.03
Aaron Presnell Coal Co.	17,012.90
F. W. Pryor Coal Co.	22,557.91
Ramsey Coal Co. and G. & E. Ramsey Coal Co.	21,210.40
Horace J. Scisson Coal Co.	37,567.96
Stephenson & Stephenson Coal Co.	23,790.93
J. H. Goforth Coal Co.	23,171.25
Dewey Trussell Coal Co.	15,436.00
Rainbow Coal Corp.	23,345.60
Days Branch Coal Co.	13,143.25
Tennco, Inc.	129,724.40
Paul Gibbs Coal Co.	38,476.80
American Pocahontas Coal Co.	23,660.42
Robin Red Ash Coal Co.	24,337.25
Total	$891,427.16

A detailed description of the foregoing cases is to be found in Appendix A hereto.

[4] All emphasis herein are supplied.

761, Int. Union etc. Workers v. *NLRB*, 6 L. Ed. 2d 592, 596, because "*the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification*". The "*recurrence of the question*" caused this Court to grant certiorari in *International Brotherhood of Teamsters, Local 695, A.F.L.* v. *Vogt, Inc.*, 354 U.S. 284, 287. Again, in granting the writ in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 302, "because of the novelty and importance of the principal question", the Court noted that "*The suit also was said to be representative of a number already commenced*" (p. 302, fn. 2).

These cases have applicability and pertinency to the instant petition. Necessarily, the several factors which Petitioners urged in the certiorari petition will persist throughout the trial of each of the thirty-six cases, and the uncertainty, confusion and conflict emphasized by Petitioners in their petition, their reply to the opposition brief, and their supplemental reply will continue to exist until this Court, upon review by certiorari, supplies the requisite juridical guides so that lower federal courts may with definitiveness advise litigants of the true apposite rules.

The effect of this Court's denial of certiorari herein will be a remand of the case to the trial court. Yet, where, as the petition (pp. 12, 16-17) notes, the Fourth Circuit's majority opinion is totally divergent from its previous holding in *Lewis* v. *Mearns*, 4 Cir., 268 F. 2d 427, though the majority opinion is silent thereof, and the Third Circuit is equally divided on the question at issue,[5] and the teaching of this Court is that

[5] See Petitioners' Supplemental Reply To Brief In Opposition for the dissent of *four* Circuit Judges in the Third Circuit's *Lewis* v. *Mears*.

denial of certiorari imports no expression on the merits of the case. *Potts* v. *U. S.*, 361 U.S. 42%, 433, fn. 9[*], the district court's rulings upon such remand are bound to reflect the same uncertainties and confusion of applicable law as do the dissents in the Fourth and Third Circuits. And, the same situation will persist in the trials of each of the enumerated pending cases.[*] Indeed, under the circumstances, a crucial inquiry is, what rule are the district courts to follow? The need for proper judicial guides for utilization in the trials of the pending litigation is an impelling reason Petitioners submit for this Court's granting the review herein sought.

Meanwhile, if such guides are not provided, moneys which this Court proclaimed in *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 468, was to provide security for employees in the coal industry and their dependents will be needlessly expended in voluminous litigation. Further, the congressional purpose of authorizing employee welfare and pension plans will be thwarted by such unnecessary expenditure of litigation costs.

CONCLUSION

For the reasons set forth above, and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of

---

[*] It is a notable observation that in his opposition brief Lowe does not challenge Trustees' assertion of the existent uncertainties, conflicts and confusion.

Appeals for the Fourth Circuit, as prayed for in said petition.

Respectfully submitted.

VAL J. MITCH,
HAROLD H. BACON,
T. G. DUDLEY,
907 Fifteenth Street, N. W.
Washington 5, D. C.

CLYDE Y. CRIDLIN,
Jonesville, Virginia.

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia.

Attorneys for Petitioners.

February, 1962.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to grounds specified in Rule 58(2) of this Court's Rules.

HAROLD H. BACON
Of Counsel for Petitioners

APPENDIX A

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. George A. Bryant, et al, individually and trading as George A. Bryant & Sons Coal Co., a partnership	3223	U.S.D.C., E.D. Tenn. Southern Division	$19,946.01	Apr. 17, 1958
Lewis et al v. E. Dick Barrow, individually & trading as E. Dick Barrow Coal Co.	3353	U.S.D.C., E.D. Tenn. Southern Division	$2[illegible]	Jun. 2, 1958
Lewis et al v. Willis Flynn, individually & trading as Willis Flynn Coal Co.	3435	U.S.D.C., E.D. Tenn. Southern Division	$21,350.48	Oct. 28, 1958
Lewis et al v. Howard Higgins, individually & trading as Howard Higgins Coal Co.	3369	U.S.D.C., E.D. Tenn. Southern Division	$12,152.15	Nov. 10, 1958
Lewis et al v. R. B. Ivey, individually & trading as R. B. Ivey Coal Co.	3424	U.S.D.C., E.D. Tenn. Southern Division	$23,082.22	Oct. 28, 1958
Lewis et al v. Will Land, individually & trading as Will Land Coal Co. and or Will Land & Sons Coal Co.	3436	U.S.D.C., E.D. Tenn. Southern Division	$12,302.90	Oct. 31, 1958
Lewis et al v. Charlie Martin, individually & trading as Charlie Martin Coal Co.	485	U.S.D.C., E.D. Tenn. Winchester Division	$33,526.63	Jan. 30, 1959
Lewis et al v. Ewing S. Hampton et al, individually and trading as Patrick & Hampton Coal Co., a partnership	3431	U.S.D.C., E.D. Tenn. Southern Division	$22,457.30	Apr. 21, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Earl Patton, individually & trading as Earl Patton Coal Co.	3432	U.S.D.C., E.D. Tenn. Southern Division	$41,741.34	Oct. 6, 1958
Lewis et al v. Hampton E. Patton, individually & trading as Hampton E. Patton Coal Co.	3433	U.S.D.C., E.D. Tenn. Southern Division	$18,442.61	Oct. 6, 1958
Lewis et al v. James Patton, individually & trading as James Patton Coal Co.	3438	U.S.D.C., E.D. Tenn. Southern Division	$36,564.30	Dec. 9, 1958
Lewis et al v. J. W. Sanders, individually & trading as J. W. Sanders Coal Co., an individual proprietorship; and J. W. Sanders, et al, individually & trading as J. W. Sanders & Sons Coal Co., a partnership	3437	U.S.D.C., E.D. Tenn. Southern Division	$6,124.48	Nov. 10, 1958
Lewis et al v. J. A. Cordell, individually & trading as J. A. Cordell Coal Co. and/or Cordell Coal & Constr. Co.	492	U.S.D.C., E.D. Tenn. Winchester Division	$11,170.72	Mar. 19, 1959
Lewis et al v. H. A. Daffron, individually & trading as H. A. Daffron Coal Co.	3287	U.S.D.C., E.D. Tenn. Southern Division	$13,692.71	Jul. 16, 1958
Lewis et al v. M. T. Dixon, individually & trading as M. T. Dixon Coal Co.	3361	U.S.D.C., E.D. Tenn. Southern Division	$16,345.40	Oct. 28, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. J. H. Graham, individually & trading as J. H. Graham Coal Co.	3224	U.S.D.C., E.D. Tenn. Southern Division	$12,948.80	Apr. 17, 1958
Lewis et al v. W. T. Morrison et al, individually & trading as M. & T. Coal Co., a partnership	3286	U.S.D.C., E.D. Tenn. Southern Division	$35,898.15	Jul. 16, 1958
Lewis et al v. Marshall Meeks, individually & trading as Marshall Meeks Coal Co.	458	U.S.D.C., E.D. Tenn. Winchester Division	$46,113.36	Oct. 28, 1958
Lewis et al v. W. T. Morrison, individually & trading as W. T. Morrison Coal Co.	3284	U.S.D.C., E.D. Tenn. Southern Division	$21,494.40	Jul. 16, 1958
Lewis et al v. Hershel Myers, individually & trading as Hershel Myers Coal Co.	456	U.S.D.C., E.D. Tenn. Winchester Division	$15,170.12	Oct. 28, 1958
Lewis et al v. Waldo Myers, individually & trading as Waldo Myers Coal Co.	455	U.S.D.C., E.D. Tenn. Winchester Division	$11,737.30	Oct. 28, 1958
Lewis et al v. Edward Nunley, individually & trading as Edward Nunley Coal Co.	486	U.S.D.C., E.D. Tenn. Winchester Division	$11,782.28	Jan. 30, 1959
Lewis et al v. Leon Nunley, individually & trading as Leon Nunley Coal Co.	459	U.S.D.C., E.D. Tenn. Winchester Division	$10,069.03	Oct. 28, 1958
Lewis et al v. Aaron Presnell, individually & trading as Aaron Presnell Coal Co.	3365	U.S.D.C., E.D. Tenn. Southern Division	$17,012.90	Oct. 31, 1958

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. F. W. Pryor, individually & trading as F. W. Pryor Coal Co.	3285	U.S.D.C., E.D. Tenn. Southern Division	$22,557.91	Jul. 16, 1958
Lewis et al v. George Ramsey, individually & trading as Ramsey Coal Co., an Individual proprietorship, Monteagle, Tennessee; and George Ramsey et al, Individually & trading as G. & E. Ramsey Coal Co., a partnership	462	U.S.D.C., E.D. Tenn. Winchester Division	$21,210.40	Nov. 10, 1958
Lewis et al v. Horace J. Scissom, individually & trading as Horace J. Scissom Coal Co.	3360	U.S.D.C., E.D. Tenn. Southern Division	$37,457.96	Oct. 28, 1958
Lewis et al v. Howard Stephenson et al, individually & trading as Stephenson & Stephenson Coal Co., a partnership	3362	U.S.D.C., E.D. Tenn. Southern Division	$23,790.93	Oct. 28, 1958
Lewis et al v. J. H. Goforth, individually & trading as J. H. Goforth Coal Co.	3243	U.S.D.C., E.D. Tenn. Southern Division	$23,171.25	May 15, 1958
Lewis et al v. Dewey Trussell, individually & trading as Dewey Trussell Coal Co.	476	U.S.D.C., E.D. Tenn. Winchester Division	$15,436.00	Dec. 9, 1958
Lewis et al v. Rainbow Coal Corp.	628	U.S.D.C., E.D. Ky.	$23,345.60	Sept. 23, 1960

Style	Civil Action No.	Court	Amount	Date Filed
Lewis et al v. Dewey Cook, Jr., individually & trading as Days Branch Darby Coal Co.	1148	U.S.D.C., E.D. Ky.	$13,144.25	Aug. 26, 1961
Lewis et al v. Tenneco, Inc.	3493	U.S.D.C., E.D. Tenn. Northern Division	$129,724.40	Mar. 13, 1958
Lewis et al v. Paul Gibbs, individually & trading as Paul Gibbs Coal Co.	419	U.S.D.C., E.D. Tenn. Winchester Division	$38,476.80	Mar. 6, 1958
Lewis et al v. James O. Large, individually & trading as American Pocahontas Coal Co.	690	U.S.D.C., S.D. W.Va.	$23,660.42	Dec. 27, 1961
Lewis et al v. Robin Red Ash Coal Co., a corporation	695	U.S.D.C., S.D. W.Va.	$24,337.25	Jan. 18, 1962
	Total		$891,427.16	

MICRO CARD
TRADE MARK ®

22

CD 4302

MATTHEW BENDER & COMPANY

19-1

microcard